

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EDDIE SOWELL SMITH,

Petitioner

v.

WARDEN CHILDERS,

Respondent.

Case No.: 2:23-cv-00527-GMN-VCF

**Order Directing Service of Petition and  
Denying Motion for Counsel**

This court dismissed Nevada prisoner Eddie Sowell Smith's *pro se* 28 U.S.C. §

2254 habeas corpus petition for failure to pay the filing fee in July 2023. (ECF No. 7.)

Judgment was entered and the case was closed. (ECF No. 8.) However, Smith had in fact paid the fee, but it was not docketed in this case due to a clerical error. (See ECF No. 9.)<sup>1</sup> The court therefore vacates the order dismissing the petition and closing the case.

Next, the court has reviewed Smith's habeas petition pursuant to Rule 4 of the Rules Governing Habeas Corpus Cases Under Section 2254 and directs that it be served on respondents.<sup>2</sup> A petition for federal habeas corpus should include all claims

<sup>1</sup> Payment was received on May 30, 2023, and was docketed in this case on September 5, 2023.

<sup>22</sup> The operative petition is the amended petition at ECF No. 4.

1 for relief of which petitioner is aware. If petitioner fails to include such a claim in his  
2 petition, he may be forever barred from seeking federal habeas relief upon that claim.  
3 See 28 U.S.C. §2244(b) (successive petitions). If petitioner is aware of any claim not  
4 included in his petition, he should notify the court of that as soon as possible, perhaps  
5 by means of a motion to amend his petition to add the claim.

6 Smith has also submitted a motion for appointment of counsel. (ECF No. 1-2.)  
7 There is no constitutional right to appointed counsel in a federal habeas corpus  
8 proceeding. *Luna v. Kernan*, 784 F.3d 640, 642 (9<sup>th</sup> Cir. 2015) (citing *Lawrence v.*  
9 *Florida*, 549 U.S. 327, 336–37 (2007)). Whenever the court determines that  
10 the interests of justice so require, counsel may be appointed to any financially eligible  
11 person who is seeking habeas corpus relief. 18 U.S.C. § 3006A(a)(2)(B). “[T]he district  
12 court must evaluate the likelihood of success on the merits as well as the ability of the  
13 petitioner to articulate his claims *pro se* in light of the complexity of the legal issues  
14 involved.” *Weygandt v. Look*, 718 F.2d 952, 954 (9<sup>th</sup> Cir. 1983). Here, Smith states on  
15 the face of his petition that he pleaded guilty to two counts of attempted battery with  
16 substantial bodily harm and was sentenced to two consecutive terms of one to four  
17 years. (ECF No. 4 at 2.) Smith’s petition sets forth his claims reasonably clearly, and  
18 the legal issues do not appear to be particularly complex. The court concludes that  
19 counsel is not warranted.

20 IT IS THEREFORE ORDERED that this court’s order dismissing the petition  
21 **(ECF No. 7) is VACATED.**

22 IT IS FURTHER ORDERED that the Clerk of Court electronically serve the  
23 amended petition (ECF No. 4) on the respondents.

1 IT IS FURTHER ORDERED that the Clerk add Aaron D. Ford, Nevada Attorney  
2 General, as counsel for respondents and provide respondents an electronic copy of all  
3 items previously filed in this case by regenerating the Notice of Electronic Filing to the  
4 office of the AG only.

5 IT IS FURTHER ORDERED that the Clerk detach and file petitioner's motion for  
6 appointment of counsel (ECF No. 1-2).

7 IT IS FURTHER ORDERED that the **motion for counsel is DENIED**.

8 IT IS FURTHER ORDERED that respondents file a response to the petition,  
9 including potentially by motion to dismiss, within **90 days** of service of the petition, with  
10 any requests for relief by petitioner by motion otherwise being subject to the normal  
11 briefing schedule under the local rules. Any response filed is to comply with the  
12 remaining provisions below, which are entered pursuant to Habeas Rule 5.

13 IT IS FURTHER ORDERED that any procedural defenses raised by respondents  
14 in this case be raised together in a single consolidated motion to dismiss. In other  
15 words, the court does not wish to address any procedural defenses raised herein either  
16 in seriatum fashion in multiple successive motions to dismiss or embedded in the  
17 answer. Procedural defenses omitted from such motion to dismiss will be subject to  
18 potential waiver. Respondents should not file a response in this case that consolidates  
19 their procedural defenses, if any, with their response on the merits, except pursuant to  
20 28 U.S.C. § 2254(b)(2) as to any unexhausted claims clearly lacking merit. If  
21 respondents do seek dismissal of unexhausted claims under § 2254(b)(2): (a) they will  
22 do so within the single motion to dismiss not in the answer; and (b) they will specifically  
23 direct their argument to the standard for dismissal under § 2254(b)(2) set forth in

1 Cassett v. Stewart, 406 F.3d 614, 623-24 (9<sup>th</sup> Cir. 2005). In short, no procedural  
2 defenses, including exhaustion, should be included with the merits in an answer. All  
3 procedural defenses, including exhaustion, instead must be raised by motion to dismiss.

4 IT IS FURTHER ORDERED that, in any answer filed on the merits, respondents  
5 specifically cite to and address the applicable state court written decision and state  
6 court record materials, if any, regarding each claim within the response to that claim.

7 IT IS FURTHER ORDERED that petitioner has **45 days** from service of the  
8 answer, motion to dismiss, or other response to file a reply or opposition, with any other  
9 requests for relief by respondents by motion otherwise being subject to the normal  
10 briefing schedule under the local rules.

11 IT IS FURTHER ORDERED that any additional state court record exhibits filed  
12 herein by either petitioner or respondents be filed with a separate index of exhibits  
13 identifying the exhibits by number. The parties will identify filed CM/ECF attachments by  
14 the number and will file each exhibit as a separate attachment.

15 IT IS FURTHER ORDERED that, at this time, the parties send courtesy copies of  
16 **any responsive pleading or motion and all INDICES OF EXHIBITS ONLY** to the  
17 Reno Division of this court. Courtesy copies are to be mailed to the Clerk of Court, 400  
18 S. Virginia St., Reno, NV, 89501, and directed to the attention of "Staff Attorney" on the  
19 outside of the mailing address label. **No further courtesy copies are required unless**  
20 **and until requested by the court.**

21 DATED: 7 September 2023.

22   
23 GLORIA M. NAVARRO  
UNITED STATES DISTRICT JUDGE